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In the Supreme Court of the United States

OCTOBER TERM, 1979

BALTIMORE REBUILDERS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

CHRISTINE WEINER
Attorney
National Labor Relations Board
Washington, D.C. 20570

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 39a-54a) is reported at 611 F.2d 1372. The Board's decision and order (Pet. App. 3a-36a) are reported at 235 N.L.R.B. 1491.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1979. The petition for a writ of certiorari was filed on March 27, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board correctly found that the maintenance and enforcement of pension fund provisions requiring cancellation of past service credits when an employer unit ceases to participate in the fund are neither discriminatory nor coercive of employee rights in violation of Sections 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act.

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. App. 1a-2a.

STATEMENT

1. The I.A.M.[1] National Pension Fund ("the Fund") was established in 1960 to provide retirement benefits for employees represented by the Union's locals (Pet. App. 18a). Approximately 2000 employers make contributions on behalf of 90,000 union-represented employees (Pet. App. 22a). Pension policies of the Fund are subject to federal regulation under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. 1001 *et seq.* (Pet. App. 30a).

The pension plan involved in this case[2] pays benefits to employees on retirement based on their total

[1] International Association of Machinists and Aerospace Workers, AFL-CIO ("the Union").

[2] The termination provisions of the Plan, Article IX, are set forth in the Board's decision (Pet. App. 19a-22a) and in the court of appeals' decision (Pet. App. 43a-45a).

period of credited service without regard to when their employer began making contributions to the Fund (Pet. App. 18a). Two kinds of credits may be applied toward pension entitlement. "Past Service Credits" are granted on a unit-wide basis when an employer begins making contributions to the Fund. On that date, each employee receives Past Service Credits that are equal to the number of months of previous employment with his employer. (Pet. App. 18a, 22a-23a; Art. III.) When an employer's contributions cease, Past Service Credits are cancelled (Art. IX, §§ 1 and 2). After the employer's contributions begin, each employee also receives "Future Service Credits" for each month of continuing employment. Future Service Credits continue to accrue so long as the employer makes contributions to the Fund (Pet. App. 18a; Art. IV). This scheme of earned and unearned credits permits older employees with long service records to receive full pension benefits even though their employer's contributions for the period preceding their retirement are insufficient to cover the Fund's liability for their pensions (Pet. App. 22a-23a).[3]

Article IX, Section 2 of the Plan provides that the participation of a contributing employer shall terminate (Pet. App. 20a):

[3] For example, through the award of Past Service Credits, the plan permits a long-time employee to accumulate 25 years of credited service even though his employer makes contributions for only one year prior to his retirement (Pet. App. 22a; Art. IV, §§ 1, 4 and 5).

a. When the employer is no longer obligated by a Collective Bargaining Agreement to make contributions to the Fund on the basis required by the Trustees; or

b. When the Employer fails to pay an amount due the Fund, and termination is deemed appropriate by the Trustees; or

c. When the employer fails to comply with administrative procedures adopted by the Trustees and termination is deemed appropriate by the Trustees.

If an employer unit terminates its participation in the Fund and ceases making contributions, all Past Service Credits are cancelled for active employees in the unit regardless of whether they continue to be represented by a Union local. Cancellation automatically occurs on the date contributions cease and is effective on a unit-wide basis (Pet. App. 45a). An exception to this cancellation requirement exists when an employer ceases to operate his business. Employees in such discontinued units do not lose their pension benefits (Pet. App. 21a; Art. XI, § 4(a)).[4]

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[4] Article IX, Section 4 (Pet. App. 21a-22a) also provides, *inter alia*, that:

> b. Past Service Credit shall not be cancelled for the following persons:
>
> (1) Covered Employees whose employment with such employer had ended at least 24 months before the participation of the Contributing Employer terminates; or
>
> (2) Covered Employees whose employment with such employer ends within thirty (30) days of the employer's termination; or
>
> (3) Covered Employees in a bargaining unit which is transferred to the jurisdiction of another I.A.M. Lodge, provided that no member of that Lodge is a Covered Employee under this Plan, and the employees' rights under this Plan are vested under Article IV, Section 4.
>
> c. Covered Employees shall have their past service credit reinstated if they earn at least five years of future service credit at any time within the eight (8) year period following the date the participation of the Contributing Employer terminates.

2. In the present case, the Union's local, Lodge #199, District #12, reached agreement on a three-year collective bargaining agreement with petitioner Baltimore Rebuilders, Inc. ("the Company") (Pet. App. 11a). That agreement obligated the Company to begin contributions to the Fund in the last year of the term of the agreement. The Company made contributions during that year and throughout the term of a second three-year contract (Pet. App. 12a). When the second contract expired, the Company and the Local failed to reach a third agreement. A strike ensued, and, three months later, the Company's employees voted to decertify the Local as their bargaining representative (Pet. App. 12a).

Four months after the election, the Fund's administrator sent the Company and its employees letters notifying them that the effect of the decertification vote was to terminate the Company's participation

in the plan and to cause the cancellation provisions to apply. That letter, which stated that the effective date of the cancellation was the date of the last employer contribution, was corrected by a second letter stating that the effective date was the expiration date of the second collective bargaining agreement (Pet. App. 12a-14a).

Upon a charge filed by the Company, the Board's General Counsel issued a complaint alleging that the Union, the Local, and the Fund violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(A) and (2), by notifying employees that the decertification vote terminated participation in the plan and cancelled Past Service Credits, and by maintaining and enforcing a provision authorizing cancellation of Past Service Credits based on a decertification vote but not on discontinuance of the employer's business (Pet. App. 9a).

The administrative law judge dismissed the complaint and the Board affirmed. The Board concluded that the cancellation provisions did not involve an unlawful discrimination based on union membership or protected activities, and did not give rise to unlawful encouragement of union membership or representation. The Board noted that "[t]o maintain its financial integrity a pension plan must provide for a limitation upon the benefits for employees with respect to whom contributions cease to be made before their pensions mature." The Board found that the employees lost Past Service Credits not because

they voted to decertify the Local, but rather because their employer had terminated his participation in the Plan. The result would have been the same "regardless of the reason for termination of an employer's participation in the pension plan (whether because the employees' representative negotiates a renewal collective-bargaining agreement that does not call for contributions to the pension plan or because the collective-bargaining relationship between the union and the employer comes to an end in consequence of a decertification proceeding or otherwise * * *)." (Pet. App. 30a-31a.)[5]

The court of appeals affirmed the Board's order (Pet. App. 35a-54a). The court found that the record contained no evidence of an intent to violate the Act and that the "cancellation provisions, on their face and as here applied, are not discriminatory or coercive. Their impact on employee voting rights is indirect and they serve a legitimate business purpose of the Fund" (Pet. App. 40a).

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[5] The Board also found that the letter notifying employees that the effect of decertification was to terminate participation in the plan was a "statement which fairly describes to the employees their status in regard to pension benefits * * * [and] does not constitute a threat or an unlawful utterance under the Act" (Pet. App. 33a).

ARGUMENT

This case turns on the interpretation of a complex set of pension plan provisions. The Board and the court of appeals, applying established legal principles, concluded that the challenged provisions of the plan were not violative of the National Labor Relations Act. Because the decision below is correct and does not conflict with that of any other court, further review by this Court is not warranted.

1. Section 8(b)(2) of the Act, 29 U.S.C. 158(b)(2), and Section 8(a)(3), 29 U.S.C. 158(a)(3), prohibit a union or its agents from causing an employer "to encourage or discourage membership in any labor organization" by "discrimination in regard to hire or tenure of employment or any term or condition of employment." These provisions plainly do not forbid all encouragement or discouragement of union membership or union activities. As this Court observed in *Local 357, Teamsters* v. *NLRB*, 365 U.S. 667, 675-676 (1961):

> When a union engages in collective bargaining and obtains increased wages and improved working conditions, its prestige doubtless rises and, one may assume, more workers are drawn to it. When a union negotiates collective bargaining agreements that include arbitration clauses and supervises the functioning of those provisions so as to get equitable adjustments of grievances, union membership may also be encouraged. The truth is that the union is a service agency that probably encourages membership whenever it does its job well. But, as we said in *Radio Officers* v. *Labor Board*, [347 U.S. 17, 42-43 (1954)] the only encouragement or discouragement of union membership banned by the Act is that which is "accomplished by discrimination."

In determining whether conduct falls within the category of forbidden discrimination, "[i]t is the 'true purpose' or 'real motive' * * * that constitutes the test." *Local 357, Teamsters* v. *NLRB, supra*, 365 U.S. at 675. Some conduct by its very nature manifests discriminatory intent. See *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 227-228 (1963). "On the other hand, when 'the resulting harm to employee rights is * * * comparatively slight, and a substantial and legitimate business end is served, the * * * conduct is prima facie lawful,' and an affirmative showing of improper motivation must be made." *NLRB* v. *Great Dane Trailers*, 388 U.S. 27, 34 (1967).[6]

2. The Company has not shown that there is evidence establishing an unlawful motive. Rather, the Company's argument (Pet. 9-12) is that the pension plan's cancellation provisions unfairly penalize employees who vote against continued union representation because a decertification vote will result in cancellation of their Past Service Credits. The Board and the court below correctly rejected that contention.

The neutral terms of the Plan provide for cancellation whenever a unit of employees is no longer cov-

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[6] The necessity for establishing an improper motive in such cases cannot be dispensed with by seeking to interdict the conduct under the more general prohibitions of Section 8(b)(1)(A) or 8(a)(1) of the Act, 29 U.S.C. 158(b)(1)(A) and 158(a)(1). See *Textile Workers* v. *Darlington Mfg. Co.*, 380 U.S. 263, 269 (1965).

ered by a collective bargaining agreement that requires employer contributions to the Fund.[7] In actual operation, several events can terminate employer contributions—only one of which is decertification of the local. A Union local and an employer may agree to join another pension plan. They may also agree to eliminate pension benefits from their contract in favor of higher wages or other benefits. And they may simply fail to reach agreement on a new contract even though the employees continue to be represented by the Union local. The cancellation provisions are not, therefore, aimed at employees who decertify the local.[8]

Moreover, whatever impact the cancellation provisions may have on the free exercise of the employees'

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[7] The Plan also permits cancellation whenever an employer, although covered by an agreement, becomes delinquent in its payments or fails to comply with administrative procedures adopted by the Trustees (Pet. App. 20a; Art. IX, § 2(b) and (c)).

[8] As the court below also pointed out (Pet. App. 52a):

> In the context of a decertification vote, the impact of cancellation is only one factor to be considered by employees and may have little impact on the election. If a second union vies to represent the unit, its pension fund may offer credits similar to those subject to cancellation. Only voting employees who were working on the initial contribution date have accrued any credits which can be cancelled. Each year of contributions reduces the ratio of unearned to earned credits for such employees, as well as for the unit as a whole. Consequently, the longer the contributions have continued, lesser is the impact of cancellation. Again, cancellation is only one of many factors involved in the collective decision to decertify * * *.

right to change their representative, it is "comparatively slight" and counterbalanced by "a substantial and legitimate business end." Thus, the record shows (Pet. App. 24a-25a) that the cancellation provisions serve the legitimate purpose of the Fund to limit its liability for unfunded benefits when payments on behalf of the employer unit prematurely cease. Past Service Credits, which represent a large unfunded liability of the Fund, are awarded when an employer unit begins payments to the Fund. The Fund's ability to grant generous pension benefits based on periods of service for which contributions were *not* made rests on the premise that employers will continue to contribute to the Fund. When employer contributions cease, the Fund reasonably limits its obligation to provide such unfunded benefits. To the extent that the cancellation provisions encourage an employer unit voluntarily to continue pension contributions, they serve the legitimate purpose of limiting unfunded liabilities which curtail the benefits that can be extended to other employees.

The exceptions to cancellation that arise when an employer goes out of business or changes its business are entirely consistent with this purpose. As the court below explained (Pet. App. 52a-53a):

> When an employer quits his business, all employees lose their jobs and no voluntary decision remains. If the employer changes business operations, the nature of the bargaining unit changes, employees may lose or change jobs, and the attractiveness of voluntary pension coverage wanes

until stability in the unit is restored. In such cases, inducements to continue contributions are likely to be unavailing and cancellation in fact would take on the nature of a "penalty" to those employees.[9]

[9] There is no merit to the Company's contention that the Board applies an unequal standard to employer and union pension plans (Pet. 7-8). In the cases cited by the Company, the Board found that the employer's pension plans, either by their express terms or by their actual operation, deprived employees of benefits if they voted for union representation. The Company fails to note that the Board similarly has found union pension plans to be unlawful when they coerce employees who are not union members or penalize employees who engage in protected activities. See, *e.g., Local Union No. 167, Progressive Mine Workers* v. *NLRB*, 422 F.2d 538, 540-542 (7th Cir.), cert. denied, 399 U.S. 905 (1970); *Peabody Coal Co.*, 180 N.L.R.B. 263 (1969).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

CHRISTINE WEINER
Attorney
National Labor Relations Board

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